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No. 665

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In the Supreme Court of the United States

OCTOBER TERM, 1959

JOE HAYES,
Petitioner

v.

FRED A. SEATON, Secretary of the Interior,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WILSON - EPES PRINTING CO. - RE 7-5002 - WASHINGTON 1, D. C.

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Joe Hayes, Petitioner, who is an American Indian, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 9, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 270 F. 2d 319, and is reprinted as Appendix A hereto, p.1. The Court's unreported order denying the petition for rehearing en banc is annexed hereto as Appendix B, p.32. The District Court did not write an opinion. The Opinion of the Acting Solicitor of the Department of the Interior is reported at 64 I.D. 401.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1959, and a dissenting opinion was filed by Judge Warren E. Burger. A petition for rehearing en banc was denied without opinion on October 5, 1959. By Order dated December 17, 1959, Mr. Justice Douglas extended to February 2, 1960, the time to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior is required by Section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 388, 389; 25 U.S.C. sec. 348) to apply State law in determining the heirs of a deceased Indian Allottee?

2. Whether under the doctrine of this Court in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), the Secretary of the Interior must follow State law in determining the heirs of a deceased Indian Allottee?

3. Whether a probate determination of the Secretary of the Interior under Section 1 of the Act of June 25, 1910 (36 Stat. 855, 25 U.S.C. sec. 372), involving the estate of an Indian Allottee who died intestate may be reviewed by the Federal Courts?

4. Whether a probate determination of the Secretary of the Interior under Section 2 of the Act of June 25, 1910 as amended by the Act of February 14, 1913 (37 Stat. 678, 25 U.S.C. sec. 373), involving the estate of an Indian Allottee who died leaving a will may be reviewed by the Federal Courts?

5. Whether the Secretary's presumption of the date of death of Joseph Thomas to be August 3, 1946 (Exactly seven years from the date of his disappearance) was erroneous and unreasonable?

STATUTES AND REGULATIONS INVOLVED

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 348.

Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372.

Section 2 of the Act of June 25, 1910, 36 Stat. 855, as amended by the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. sec. 373.

25 CFR pt. 15.1

25 CFR pt. 15.15

25 CFR pt. 15.20

Oregon Revised Statute 41:360, (26)

Oregon Revised Statutes 111.020 (3) (4)

STATEMENT OF THE CASE

On September 22, 1940, John Thomas, a Cayuse Indian residing in Oregon, died leaving a will in which he devised all of his allotted Indian property to his son, Joseph Thomas. But Joseph Thomas disappeared on August 3, 1939, some 13 months prior to the death of John, and despite diligent search and inquiry has not been heard of since.

As a result of the death of the father, John Thomas, and the disappearance of the son, Joseph Thomas, the Examiner of Inheritance of the Department of the Interior, under Sections 1 and 2 of the Act of June 25, 1910, as amended (25 U.S.C. secs. 372, 373), and the Department's regulations, probated the estate of John Thomas (valued at $63,811.09) and the estate of Joseph Thomas (valued at $6,259.53).

The rival claimants to the estates of John and Joseph Thomas are two Indians, Emma J. Luton, and petitioner, Joe Hayes. Emma J. Luton is the widow of Samel

Luton deceased maternal half-brother of Joseph Thomas. Joe Hayes is the first cousin and heir-at-law of John Thomas.

The question of whether Emma J. Luton or petitioner Joe Hayes is entitled to inherit the estates of John and Joseph Thomas turned on the single issue of whether Joseph Thomas survived his father John.

Under date of June 20, 1956, the Examiner of Inheritance made an "Order of Presumption of Death and Determining Heirs" in the *estate of Joseph Thomas.* In this order, the Examiner presumed the *date of death* of Joseph Thomas to be August 3, 1946 (seven years after his disappearance), and ruled that Joseph's estate descended to his maternal half-brother, Samuel Luton, who died later, leaving as his sole heir, his wife, Emma J. Luton, a Cayuse Indian.

Under date of June 20, 1956, the Examiner of Inheritance issued another "Order Approving Will and Determining Heir of Subsequently Deceased Devisee" in the *estate of John Thomas.* Presuming the *date of* Joseph's death to be August 3, 1946, the Examiner concluded in his order that Joseph survived his father John; that Joseph took under the devise in his father's will; that upon Joseph's death the estate of John Thomas descended to Joseph's maternal half brother Samuel Luton; that upon the death of Samuel the estate of John Thomas descended to Emma J. Luton, Samuel's widow.

Petitioner took an appeal to the Secretary who affirmed the Examiner's Orders through his Solicitor.

Thereafter, petitioner filed a complaint in the District Court to set aside the Examiner's Orders, invoking the Court's jurisdiction under Section 10 of the Administrative Procedure Act.[1] In his pleadings petitioner asserted

[1] 60 Stat. 243 (1946), 5 U.S.C. sec. 1009.

that the Secretary erred as a matter of law when he presumed the *date of death* of Joseph Thomas to be August 3, 1946 (7 years from the date of his disappearance), thereby presuming that Joseph Thomas survived the testator John Thomas; that since Emma Luton was claiming the estate of John Thomas as the representative of the devisee Joseph, she had the burden of proving that Joseph survived John; that since she failed to prove that Joseph survived John, the devise to Joseph lapsed and the estate of John was inherited by petitioner under Oregon law by virtue of his relationship as the first cousin and heir-at-law of John Thomas.

In his pleadings in the District Court the Secretary asserted that the court had no jurisdiction to review his determinations in the case. Explaining the rational basis of his determinations, the Secretary stated that he believed there was no dispute as to the facts; that there was no evidence to show that Joseph Thomas survived John Thomas; that the Examiner's determination that Joseph survived John was based on a presumption under Oregon law (as distinguished from a finding of fact based upon evidence); and that the law of the State of Oregon must govern this case.

By order dated September 17, 1958, the District Court dismissed petitioner's complaint and granted respondent's motion for summary judgment.

In his pleadings in the Court of Appeals on the substantive issues, respondent changed his previous position and asserted that the Examiner's determination that Joseph survived John was a finding of fact based on the evidence; that the Secretary was not obliged to follow Oregon law; and that "federal" rather than State law governed in the case.

The majority opinion of the Court sustained the District Court's dismissal of petitioner's complaint stating:

"Even if it [The Secretary's determination] were reviewable and in our opinion erroneous, we could not disturb it, for it was not arbitrary or unreasonable."[1]

The dissent of Judge Burger states in part:

"I believe that the Secretary should be required to follow state law concerning the presumption which, in this instance, controls descent and distribution and thus has the effect of substantive law.

"If we apply the law of Oregon, then, the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co., supra.*[8] It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable.

"Turning now to the other possible interpretation of the Examiner's orders, I do not believe that his finding has any substantial basis in the evidence. Since the majority did not decide this point, no purpose would be served by reviewing the evidence here. Suffice it to say that careful scrutiny of the entire record satisfies me that the evidence would not furnish any basis for the Examiner's conclusion."[2]

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals:

1. (a) Presents the issue of whether State or "federal" law governs the Secretary's determination of the heirs of deceased Indian Allottees. This question is of

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[1] 270 F. 2d 321.

[2] 270 F. 2d 325, 326.

such vital importance to an estimated quarter of a million American Indian Allottees or their heirs who are subject to the probate jurisdiction of the Secretary of the Interior as to merit review and resolution by this Court;

(b) Is in conflict with the mandate of the Congress in Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 348;

(c) Is in conflict with the principles laid down by this Court in *Erie R. R.* v. *Tompkins*, 304 U.S. 64 (1938);

(d) Is in conflict with the decision of the 10th Circuit Court of Appeals in *Peoria Tribe or Band of Indians* v. *Wea Townsite Co.*, et al, 117 F. 2d 940, 943 (C.C.A. 10, 1941).

2. (a) Presents issues regarding the extent to which the probate determinations of the Secretary may be reviewed by the Federal Courts and the availability of a judicial remedy to American Indians who are subject to the Secretary's probate jurisdiction;

(b) Is in conflict with the principles laid down by this Court in *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915), in *Kessler* v. *Strecker*, 307 U.S. 22, 34 (1938) and in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 (1919);

(c) Is in conflict with decisions of the Eighth and Tenth Circuit Courts of Appeal in *Dixon* v. *Cox*, 268 F. 285 (C.C.A. 8, 1920), *Bowling* v. *United States*, 299 F. 438, 444 (C.C.A. 8, 1924) and *Peoria Tribe* or *Band of Indians* v. *Wea Townsite Co.* et al., 117 F. 2d 940 (C.C.A. 10, 1941);

(d) Is in conflict with the Court's previous rulings in the cases of *Homovich* v. *Chapman*, 89 U.S. App. D.C. 150, 191 F. 2d 761, 764 (1951), and *Seaton* v. *The Texas Company*, 103 U.S. App. D.C. 163, 256 F. 2d 718, 723, 724 (1958);

3. (a) Is erroneous and in conflict with the law of the State of Oregon as enunciated in *Hefford* v. *Metropolitan Ins. Co.*, 73 Ore. 353, 372, 144 P. 2d 695, 702 (1944);

(b) Is unreasonable and unsupported by the evidence of record.

I

The Secretary In The Position Asserted By Him In The Court Of Appeals Failed To Follow The Law Of The State Of Oregon As Required In The General Allotment Act And By The Principles Laid Down By This Court In *Erie R.R.* v. *Tompkins*.

The Secretary of the Interior took the position in the Court of Appeals that he is not required to follow State law, but may apply "federal" law in the instant case. This position was taken by the Secretary despite the express mandate of the Congress contained in Section 5 of the General Allotment Act of February 8, 1887, as amended, that State law shall govern in determining the heirs of a deceased Indian allottee.[1]

Section 5 of the General Allotment Act, supra, provides in pertinent part:

> "That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, *or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located*, and that at the expiration of said period the United States will convey the same by patent to said Indian, *or his heirs* as aforesaid, in

[1] 24 Stat. 388, 389; 25 U.S.C. sec. 348.

> fee discharged of said trust and free of all charge or incumbrance whatsoever." (Emphasis supplied).

Commenting on the above quoted language of the General Allotment Act, *Federal Indian Law* clearly states that the Secretary must follow State law in determining the heirs of deceased Indian Allottees:

> "As will be readily perceived, these provisions entirely withdraw from the operation of tribal laws and customs all matters of descent and partition concerning allotments made to Indians under the General Allotment Act, *and the laws of the State in which the land is situated must govern such matters, except insofar as these matters are otherwise covered by Federal statutes.*[1] (Emphasis supplied).

In *Peoria Tribe or Band of Indians* v. *Wea Townsite Co.* et al, 117 F. 2d 940, 942 (C.C.A. 10, 1941), the Court of Appeals for the Tenth Circuit held that State law governs in matters concerning the descent and distribution of lands allotted to Indians under the General Allotment Act, supra.

The same view is expressed by Judge Burger as follows:

> "The Secretary is bound by the General Allotment Act to follow state law in matters concerning descent and distribution."[2]
>
> • • • •
>
> *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), did not merely concern cases brought in United States District Courts under diversity jurisdiction. There, Mr. Justice Brandeis made the sweeping statement: 'There is no federal general common law.' 304 U.S. at 78. Justice Brandeis' famous dictum really means, it seems to me, that state law should control unless there is some compelling reason to the contrary."[3]

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[1] *Federal Indian Law*, 1958 edition, at p. 506; this treatise was prepared under the supervision of the Solicitor of the Department of the Interior and published under the Department's auspices.

[2] 270 F. 2d 325.

[3] 270 F. 2d 325.

The Estate of John Thomas and the Estate of Joseph Thomas are composed of allotted Indian lands and derivative property located in the State of Oregon. Consequently, under the General Allotment Act, supra, and this Court's holding in *Erie R.R. v. Tompkins*, supra, the Secretary of the Interior was obliged to apply Oregon law in the instant case.

The tacit view of the Court of Appeals that "federal" law is applicable in the instant case is in conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Peoria Tribe or Band of Indians* v. *Wea Townsite Co.*, et al, supra. Petitioner respectfully submits that these conflicting views should be resolved by this Court.

The position taken by the Secretary at the Court of Appeals level, implicitly sustained by the majority of the Court, that "federal" rather than State law is applicable has introduced a mass of confusion in the Department's probate administration of Indian Estates which embrace allotted Indian lands. For the question of whether "federal" or State law is applicable is not limited to the adjudication of this case, it affects an estimated quarter of a million Indian allottees or their heirs who are subject to the probate jurisdiction of the Secretary.[1]

II

The Secretary's Probate Determinations Under Sections 1 And 2 Of The Act Of June 25, 1910, As Amended, Are Reviewable By The Courts.

The majority of the Court of Appeals ruled that the Secretary's determination under Section 1 of the Act of June 25, 1910, supra, is final and conclusive, and not subject to review by the judiciary even if there has been error in the application of law to the facts of record.

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[1] House Report 2503 (82nd Cong. 2d Sess., Dec. 15, 1952)

It should be noted at the outset of this discussion on jurisdiction, that there is no question of public policy involved in the issue of whether the Indian, Emma J. Luton, or the Indian, Joe Hayes, is entitled to inherit the estates of Joseph and John Thomas. Essentially, the Examiner of Inheritance in this case is acting as a probate court in determining which of two *private* claimants is entitled to inherit the estates being probated. In this connection the following observations of the Court of Appeals in *Seaton* v. *The Texas Company*, (1958), 103 U.S. App. D.C. 163, 256 F. 2d 718, 723, 724, are singularly appropriate for application to this case:

> "When the controversy is fundamentally between two private interests, as here and as was so in *Moore* v. *Robbins*, supra . . . his discretion is not as great as when the controversy is between private interests on the one hand and the Secretary 'as guardian of the people,' on the other. . . . The law is not blind to such distinctions . . .
>
> "In this situation we think the court may decide whether the choice made by the Secretary between the private parties is plainly wrong in the eyes of the law.
>
> *"Unless judicial relief as between private interests is available when the judicial conscience concludes that to let the administrator's solution stand would leave uncorrected plain legal error, his authority would be so absolute as to be inconsistent with basic conceptions of a government under law, with advantage to neither administrator, public, nor private parties."* (Emphasis added)

Is the Indian Joe Hayes to understand that the Federal Courts will afford judicial relief to *non-Indians* when the Secretary has erred in the application of law in a matter involving private interests, and that no such judicial relief will be afforded to *Indians* in essentially the same situation?

The answer to this question is of interest not only to

the Indian Joe Hayes, but it is of great interest also to the estimated quarter of a million Indians who are subject to the probate jurisdiction of the Secretary of the Interior.

The Estate of Joseph Thomas was probated by the Secretary under Section 1 of the Act of June 25, 1910, supra, which authorizes the Secretary to probate the estates of Indian allottees who die intestate. This section provides that the Secretary's decision shall be "final and conclusive".

But, this court, in the case of *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915), laid down the principle that the conclusiveness to be accorded administrative determinations, is conclusiveness upon *matters of fact* only. This court has repeatedly held that an administrative determination may be set aside by the courts where error of law was committed.[1] This principle was specifically applied to probate determinations of the Secretary of the Interior by the Eighth Circuit Court of Appeals in the cases of *Dixon* v. *Cox*[2] and *Bowling* v. *United States*.[3] In the latter case the Court stated:

> "And such findings are conclusive *in the absence of a showing of fraud, error of law, or gross mistake of fact.*" (Emphasis added)

This view was also adopted by the 10th Circuit Court of Appeals in the case of *Peoria Tribe* or *Band of Indians* v. *Wea Townsite Co.* et al., 117 F. 2d 940, 942 (1941), and by *Federal Indian Law*.[4]

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[1] *Kessler* v. *Strecker*, 307 U.S. 22, 34 (1938); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 (1919).

[2] 268 F. 285 (C.C.A. 8, 1920).

[3] 299 F. 438, 444 (C.C.A. 8, 1924).

[4] 1958 Edition at pages 78 and 365.

Consequently, on the question of reviewability by the Judiciary of the Secretary's determinations under Section 1 of the Act of June 25, 1910, supra, there is a conflict on the one hand between the Courts of Appeal for the Eighth and Tenth Circuits, and the Court of Appeals for the District of Columbia Circuit in the instant case. Petitioner respectfully submits that this conflict of opinion in the lower courts should be resolved by this Court.

The Estate of John Thomas was probated by the Secretary of the Interior under Section 2 of the Act of June 25, 1910, as amended by the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. sec. 373.

The view that a Section 2 determination by the Secretary may be reviewed was forcefully expressed by Chief Judge Prettyman in the earlier case of *Homovich* v. *Chapman*, 89 App. D.C. 150, 191 F. 2d 761, 764 (1951) as follows:

> "The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts, and no case to the contrary is cited to us. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will provides that his determination 'shall be final and conclusive', therefore, Section 2 of that Act, dealing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so."

Referring to the *Homovich* case, respondent, himself, apparently conceded the authority of the courts to review his determination in a Section 2 case, where an Indian leaves a will, when he stated:

> "The jurisdiction to review rulings when an Indian has left a will under Section 2 of the 1910 Act is somewhat broader than the jurisdiction relating to intestate estate proceedings under Section 1. *Homovich* v. *Chapman*, 89 App. D.C. 150, 191 F. 2d 761 (1951)." [1]

Nevertheless, respondent contended in the Court of Appeals that the power of the judiciary to review the Secretary's determination in the Estate of John Thomas was *foreclosed by the action of the Examiner of Inheritance* when he applied his finding in the Estate of Joseph Thomas (a Section 1 case) to his determination in the Estate of John Thomas (a Section 2 case).

Thus the Executive Branch not only forecloses judicial review but also denies petitioner his right to a judicial remedy.

Considering respondent's contention, Judge Burger, in the following excerpt from his dissent, argued that judicial review in the estate of John Thomas could not be foreclosed at the option of the Examiner:

> "Nevertheless, it is clear that a finding as to the date of the son's death is essential to the disposition of both estates. That this finding was arbitrarily borrowed by the Examiner when he made his determination as to the Section 2 estate has no bearing on whether the court can or cannot review that determination. If the statute permits any judicial review of a Section 2 determination, as we held it did in *Homovich* v. *Chapman*, 1951, 89 U.S. App. D.C. 150, 191 F. 2d 761, that review is not foreclosed by the fact that the particular finding which a party attacks was adopted from another and perhaps unreviewable proceeding." [2]

Criticizing the majority opinion with regard to this matter Judge Burger further stated:

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[1] Respondent's brief in the Court of Appeals at page 12.

[2] 270 F. 2d 322.

> Here the majority has completely and finally foreclosed all judicial review of an administrative determination that appellant is not entitled to inherit the estate of John Thomas (valued at $63,811.09). They have done this solely because a statute which has no application to the John Thomas estate prevents, so they hold, judicial review of the determination that appellant is not entitled to inherit the estate of Joseph Thomas (valued at $6,259.53). This then becomes a case where the majority permits a $6000 tail to wag a $63,000. dog. The majority has certainly ignored the presumption of reviewability if they have not indeed adopted a presumption of unreviewability."[1]

Discussing the general principles governing reviewability by the Courts, Judge Burger states:

> "Absent a clear legislative expression making unreviewable an administrative action of this character, courts should be reluctant to find lack of jurisdiction. See *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 195 (1910);[2] *The King* v. *Plowright*, 3 Mod. 94, 87, Eng.Rep. 60 (K.B. 1686); 4 DAVIS, ADMINISTRATIVE LAW TREATISE ch. 28 (1958).
>
> "Professor Jaffe has stated the general principle thusly: "[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." Jaffe, *The Right to Judicial Review*, 71 HARV.L.REV. 401, 420 (1958)."[2]

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[2] "Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

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[1] 270 F. 2d 323.

[2] 270 F. 2d 322, 323.

III

The Secretary's Determinations Are Erroneous And Unreasonable And Unsupported By The Evidence Of Record.

Petitioner contends that under the law of the State of Oregon [1] the Examiner erred in presuming *the date of* Joseph Thomas's death to be August 3, 1946, exactly 7 years from the date of his disappearance.

As Judge Burger states in his dissent:

> "The Oregon Supreme Court has held that in a disappearance case *no* presumption arises as to the *date* of death but only to the fact of death. *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372, 144 P. 2d 695, 702 (1944):
>
> > "'The weight of authority, both in this country and in England, is that the presumption from seven years' absence *is of death alone* and not of the *time* of death. The presumption of death arises at the *end* of seven years, but by this it is not meant that death is presumed to have occurred at that time, but on some day within the seven year period. According to the leading case of *Nepean* v. *Doe d. Knight*, 2 M. & W. 894, 150 Eng. Rep. 1021 (Ex 1837), the probabilities are that the death took place a considerable time before expiration of the seven year period. In that case Lord Denman, C. J., said at p. 913 of the report [150 Eng. Rep. at 1029]: 'Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of *all the points of time the last day is the most improbable*, and most inconsistent with the ground of presuming the fact of death . . .'"
>
> (Emphasis added.)"

Judge Burger further states in the last page of his dissent:

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[1] *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372, 144 P. 2d 695, 702 (1944).

"I believe that the Secretary should be required to follow state law concerning the presumption which in this instance, controls descent and distribution and thus has the effect of substantive law.[1]

"If we apply the law of Oregon, then, the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co.*, supra.[8] It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable.

"Turning now to the other possible interpretation of the Examiner's orders, I do not believe that his finding has any substantial basis in the evidence. Since the majority did not decide this point, no purpose would be served by reviewing the evidence here.

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[1] The Solicitor's view on this question coincides with judge Burger's as evidenced by the following quotation from his opinion in the instant case:

"25 CFR 81.20 provides that an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed to be dead. The Department in its determination of this issue has adopted the laws of the State of domicile of the decedent." (Decision of Solicitor, dated Nov. 6, 1957, in the instant case at J.A. 17A.)

However, this view was fundamentally changed by respondent in his brief in the Court of Appeals at page 8, as follows:

"The cases precluding the use of this presumption are not controlling. The Secretary is not required to follow state law, except for the laws of descent and distribution. Therefore, it was not error to apply the rule espoused in the federal courts permitting use of the presumption.

[8] "The earlier case of *Fink* v. *Prudential Ins. Co.*, 162 Ore. 37, 90 P. 2d 762 (1939), is not to the contrary because, under the circumstances of that case, the Court merely refused to indulge in any *presumption of death*. It did not reach the issue of a presumption as to the time of death." (footnote on last page of Judge Burger's dissent.)

Suffice it to say that careful scrutiny of the entire record satisfies me that the evidence would not furnish any basis for the Examiner's conclusion.

"For the foregoing reasons I would reverse the summary judgment for the Secretary and remand the case to the District Court with directions to vacate the Secretary's order insofar as it relates to the estate of John Thomas and remand the case to the Secretary for further proceedings."

Moreover, since Emma Luton was claiming the estate of the testator John Thomas as the representative of the devisee Joseph Thomas, she had the burden of proving that Joseph survived John. Having failed to do so, the devise to Joseph lapsed[1] and the estate of John Thomas was inherited by petitioner Joe Hayes under Oregon law.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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[1] 1 *Taylor Evidence* (11th Ed., 1920) sec. 200; 1 *Greenleaf Evidence* (13th Ed. 1876) sec. 41, footnote 2 at pp. 50, 51. In *Re Phene's Trusts*, Law Rep. 5 Ch. 139; In *Re Lewes's Trusts*, Law Rep. 11 Eq. 326. Taylor and Greenleaf on Evidence and the English cases cited herein were cited as authoritative by the Supreme Court in *Davie* v. *Briggs*, 97 U.S. 628 (1878).

[2] O.R.S. 111.020 (3) (4), Oregon Revised Statutes.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,813

JOE HAYES, APPELLANT

v.

FRED A. SEATON, Secretary of the Interior, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided July 9, 1959

Mr. Leon BenEzra for appellant.

Mr. Robert S. Griswold, Jr., Attorney, Department of Justice, with whom *Mr. Roger P. Marquis*, Attorney, Department of Justice, was on the brief, for appellee.

Before EDGERTON, DANAHER, and BURGER, *Circuit Judges*.

EDGERTON, *Circuit Judge:* Section 1 of the Act of June 25, 1910, 36 STAT. 855, as amended, 25 U.S.C. §372, provides in part:

> "When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. . . ."

Joseph Thomas, an Indian, disappeared August 3, 1939, and has not been heard from since. His father John Thomas, an Indian, died September 22, 1940, leaving a will made in 1923. After disposing of clothes, the will said: "all other property of any nature belonging to me or in which I have any interest to my son Joe Thomas." The Secretary of the Interior decided that the son survived the father and took his estate, and that Emma J. Luton, as the son's heir, took both estates.

If the son did not survive the father, (1) the father's devise to the son lapsed; (2) the father, not Emma Luton, was the son's heir; and (3) appellant Hayes, as the father's heir, took both estates. Appellant Hayes asks review and reversal of the Secretary's decision that the son survived the father and Luton is the heir.

Since the Secretary's decision that the son survived the father was an essential part of the Secretary's "final and conclusive" ascertainment of the son's legal heirs, it was a final and conclusive decision. It determined who took the son's property and also who took the father's property. We think it was final and conclusive for both these purposes. Even if it were reviewable and in our opinion erroneous, we could not disturb it, for it was not arbitrary or unreasonable. "'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939).

We see no basis for appellant's reliance on § 2 of the 1910 Act, 25 U.S.C. § 373. It provides (1) that the Secretary may prescribe regulations in accordance with which Indians may make wills disposing of trust property, and (2) that "no will so executed shall be valid . . . until it shall have been approved by the Secretary . . . ." As we held in *Homovich* v. *Chapman*, 89 U.S.App.D.C. 150, 153, 191 F. 2d 761, 764, this section does not prevent

judicial review of the Secretary's action in making regulations for executing wills or in approving wills. But even in regard to such matters, we said: "To be sure, if upon such review it appears that [the Secretary's] action was within the scope of the authority conferred upon him, the court cannot disturb his decision." Moreover, the present case does not turn on such matters. It is undisputed that the Secretary's regulations for making wills were valid, that the will of John Thomas was validly executed, and that the will was approved by the Secretary. The appellant attacks only the Secretary's decision that the son survived the father, and its consequences. As we have shown in the preceding paragraph of this opinion, we cannot disturb that decision.

We think the District Court was right in dismissing appellant's complaint.

Affirmed.

BURGER, *Circuit Judge, dissenting:* The resolution of this case turns on the factual issue as to whether John, the father, or Joseph, the son, died first. If the father died first, his property passed to his son Joseph under his will. If the son died first, the father inherited his son's property by intestate succession. The heir-at-law of the last survivor of the two is now entitled to both estates. The heirs of the two estates were the opposing litigants before the Examiner of Inheritance.

I—Jurisdiction

Although only one question is disputed, it must be constantly kept in mind that two separate estates are involved. Since the father died leaving a valid will, Section 2 of the 1910 Act, 36 Stat. 856, as amended, 25 U.S.C. § 373, controls the disposition of his estate. The son died intestate, hence Section 1, 36 Stat. 855, as amended, 25 U.S.C. § 372, controls his estate.

Yet the majority "see no basis for appellant's reliance" on Section 2. As I shall try to develop below, it might quite as well be said that there was no basis for the Secretary's reliance on Section 1. I believe the correct analysis is that both sections have equal bearing. I see no reason why the answer to the underlying question must first be given with respect to the Section 1 estate and then merely adopted without analysis for purposes of the Section 2 estate.

This, however, is exactly what the Secretary's Examiner did and the majority now adopt his arbitrary position and make it conclusive and therefore unreviewable. On June 20, 1956, the Portland, Oregon, Examiner of Inheritance entered an order in the matter of the son's estate, reciting:

> "Joseph Thomas [the son] is hereby presumed to have died intestate, and the date of his death is determined to have been on August 3, 1946, at the age of 35 years."[1]

All of the foundation for this determination was recited in the order and it is as follows:

> "The evidence taken at the hearings . . . indicates that diligent search has been made for the above named person [the son, Joseph Thomas] by interested and other parties without avail. The records show that the party had little regard for his relatives and had no local attachments of any kind and was in the habit of leaving home for considerable periods of time without notifying anyone of his whereabouts. Further, there is no evidence of any catastrophe involved in which Joseph Thomas may have perished at the time of his disappearance."

On the same day this order was entered, the Examiner of Inheritance entered another order approving the

[1] All parties agree that the father died on September 22, 1940, and that the son disappeared on August 3, 1939.

father's will and determining the "heir of subsequently deceased devisee [the son]," reciting:

> "A decree has been issued this date in the estate of Joseph Thomas, *presuming* him to have died on August 3, 1946, at the age of 35 years, which was 7 years from the time of his disappearance. The reasons for this are *fully* set forth in the Order in that case." (Emphasis added.)

In other words, the Examiner made a finding with respect to the son's Section 1 estate, and then in disposing of the father's Section 2 estate, merely adopted this finding without further consideration. Nevertheless, it is clear that a finding as to the date of the son's death is essential to the disposition of *both* estates. That this finding was arbitrarily borrowed by the Examiner when he made his determination as to the Section 2 estate has no bearing on whether the court can or cannot review that determination. If the statute permits any judicial review of a Section 2 determination, as we held it did in *Homovich* v. *Chapman*, 89 U.S.App.D.C. 150, 191 F.2d 761 (1951), that review is not foreclosed by the fact that the particular finding which a party attacks was adopted from another and perhaps unreviewable proceeding.

Nor do I agree with the majority when they say that Section 2 has no relevance because it merely gives the Secretary authority to "approve" Indian wills. The Examiner determined who should inherit the property of John Thomas under his will. The authority to make such a determination must be found in Section 2 or else it does not exist. Section 1 does not give the Secretary any such authority; it deals only with intestate property. Section 2, which conferred upon John Thomas the right to devise property in accordance with the Secretary's regulations, thereby implicitly gave the Secretary authority to resolve the present dispute which arises from an exercise of that statutory right. This authority has been

exercised in this case, and seems to me subject to judicial review under *Homovich* v. *Chapman, supra.*

To summarize, the fact that the District Court may perhaps not have power to review the Secretary's Section 1 decision concerning the son's estate alone is irrelevant insofar as a Section 2 decision is concerned, and all judicial review should not be foreclosed simply because the dispositive finding is present in both decisions below. The Secretary argues that this may lead to "the absurd result of contradictory findings of the same fact." This argument is not convincing because, if the court should reverse one of the Secretary's determinations while not passing on the other, it has not thus prevented the Secretary himself from subsequently reviewing that decision which has been left untouched by the court. The problem of "contradictory findings" is within his power to correct. Absent a clear legislative expression making unreviewable an administrative action of this character, courts should be reluctant to find lack of jurisdiction. See *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 195 (1910);[2] *The King* v. *Plowright*, 3 Mod. 94, 87 Eng.Rep. 60 (K.B. 1686); 4 DAVIS, ADMINISTRATIVE LAW TREATISE ch. 28 (1958).

Professor Jaffe has stated the general principle thusly: "[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." Jaffe, *The Right to Judicial Review*, 71 HARV.L.REV. 401, 420 (1958). Here the majority has completely and finally

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[2] "Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

foreclosed all judicial review of an administrative determination that appellant is not entitled to inherit the estate of John Thomas (valued at $63,811.09). They have done this solely because a statute which has no application to the John Thomas estate prevents, so they hold, judicial review of the determination that appellant is not entitled to inherit the estate of Joseph Thomas (valued at $6,259.53). This then becomes a case where the majority permits a $6000 tail to wag a $63,000 dog. The majority has certainly ignored the presumption of reviewability if they have not indeed adopted a presumption of unreviewability.

My disagreement with the majority concerning jurisdiction to review requires me to analyze issues which they did not reach. As I see it, there are two further issues: (1) what is the scope of review and (2) within this scope was the District Court correct in granting summary judgment to the Secretary?

II—Scope of Review

As the majority point out, we said in *Homovich* v. *Chapman*, *supra*: "To be sure, if upon such review it appears that [the Secretary's] action was within the scope of the authority conferred upon him, the court cannot disturb his decision." The majority fail to note, however, that the *Homovich* opinion proceeds to hold that Section 10 of the Administrative Procedure Act[3] governs review of action taken by the Secretary under the authority of Section 2 of the 1910 Act.

Section 10(e) of the APA lays down broad general guides for the scope of review. These guides only infrequently answer specific problems as posed by actual cases. As Professor Davis has put it, "the degree of intensity of review is not necessarily susceptible of em-

[3] 60 Stat. 243 (1946), 5 U.S.C. § 1009.

bodiment in a word formula."[4] Yet we do find guides consistent with Section 10(e) of the APA in a phrase that runs through the cases: an administrative decision should be upheld unless it is not supported by substantial evidence on the record considered as a whole. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).[5] *Homovich* v. *Chapman* certainly did not intend to deviate from these established general formulas. If anything, the spirit as distinguished from the letter of that case tends to a broadening of the scope of review. This is clearly indicated by the court's holding there that Section 10 of the APA is applicable to cases arising under Section 2 of the 1910 Act.

III—Correctness of Decision

Turning to the final issue and applying these general guides for review, was the District Court right in granting summary judgment for the Secretary? I think not.

It is not clear from the record whether the Examiner of Inheritance *presumed* the son, Joseph Hayes, to have died exactly seven years after the date of his disappearance or whether he made this finding by weighing all the evidence. More likely he did the former, but whichever he did, his action seems clearly erroneous to me. In other words, if he made a presumption of law, he did so upon an improper interpretation of applicable law. If he made a factual determination, it is not supported by substantial evidence *on the record as a whole.*

Considering his finding first as a presumption of law, we are met at the outset with a difficult problem of con-

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[4] DAVIS, *op. cit. supra*, § 28.12 at 64.

[5] For general discussions, see DAVIS, *op. cit. supra;* Jaffe, *Judicial Review: Question of Fact*, 69 HARV.L.REV. 1020 (1956); Jaffe, *Judicial Review: Question of Law*, 69 HARV.L.REV. 239 (1955); Schwartz, *Gray vs. Powell and the Scope of Review*, 54 MICH.L. REV. 1 (1955).

flict of laws. The Oregon Supreme Court has held that in a disappearance case *no* presumption arises as to the *date* of death but only as to the fact of death. *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372, 144 P.2d 695, 702 (1944):

> "The weight of authority, both in this country and in England, is that the presumption from seven years' absence *is of death alone* and not of the *time* of death. The presumption of death arises at the *end* of seven years, but by this it is not meant that death is presumed to have occurred at that time, but on some day within the seven year period. According to the leading English case of *Nepean* v. *Doe d. Knight*, 2 M. & W. 894, 150 Eng. Rep. 1021 (Ex. 1837), the probabilities are that the death took place a considerable time before expiration of the seven year period. In that case Lord Denman, C. J., said at p. 913 of the report [150 Eng. Rep. at 1029]: 'Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; *of all the points of time the last day is the most improbable*, and most inconsistent with the ground of presuming the fact of death. . . .'" (Emphasis added.)

On the other hand, the United States Supreme Court has found it permissible for a tribunal, presumably in a disappearance case (where there is no evidence of any specific peril), to indulge in the presumption that life continued throughout the seven years necessary to raise the presumption of death. *United States* v. *Wildcat*, 244 U.S. 111 (1917); *Fidelity Mut. Life Ass'n* v. *Mettler*, 185 U.S. 308 (1902). *But see Davie* v. *Briggs*, 97 U.S. 628 (1878). Thus the English concept adopted by Oregon and the concept enunciated by the Supreme Court are in disagreement.

Section 2 of the 1910 Act authorizes persons

> "having any right, title, or interest in any allotment held under trust or other patent containing restric-

> tions on alienation or individual Indian moneys or other property held in trust by the United States . . . to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior." 36 Stat. 856 (1910), as amended, 25 U.S.C. § 373.

The Secretary has prescribed no regulations which have any bearing on the presumption we are considering. Therefore, in order to find a source for this presumption, we must look outside the federal statute and outside any regulations promulgated thereunder.

There are only two possible sources in this case: general federal law or Oregon law. I think the Examiner was compelled to look to Oregon law. In *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956), the Court said:

> "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. [Citations omitted.] This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern."

Here, admittedly we are not dealing with a matter of strictly domestic relations in the narrow sense. The problem is whether a certain fact, *i.e.*, the *time* of death, can be presumed as a matter of law. The Secretary is bound by the General Allotment Act to follow state law in matters concerning descent and distribution. 24 Stat. 389 (1887), as amended, 25 U.S.C. § 348. The Secretary argues, however, that the probem here is not one of descent and distribution but one of evidence and that therefore the General Allotment Act is not applicable.

Arenas v. *United States*, 197 F.2d 418 (9th Cir. 1952), held that the General Allotment Act did not compel the Secretary to follow California law in determining whether a certain adoption was valid. This was dispositive be-

cause only if the child was validly adopted would she be entitled to certain Indian property by virtue of intestate succession under Section 1 of the 1910 Act. This result—that the Secretary was not compelled to follow state law—seems contrary to the teaching that where there is a choice between federal and state law in determining the existence of a right (whether or not that right is created by a federal statute) state law should be preferred unless there is some overriding consideration to the contrary.[6] For this reason I would not follow the *Arenas* case as to this point.

Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938), did not merely concern cases brought in United States District Courts under diversity jurisdiction. There, Mr. Justice Brandeis made the sweeping statement: "There is no federal general common law." 304 U.S. at 78.[7] Justice Brandeis' famous dictum really means, it seems to me, that state law should control unless there is some compelling reason to the contrary. Among other things the need for administrative uniformity over the whole country might well be such a "compelling reason," but no policy of national uniformity can be achieved here because the Secretary is required by the General Allotment Act to follow state laws of descent and distribution. It cannot therefore be maintained that regulation of Indian affairs is strictly a matter of federal rather than of state concern: Congress has spoken to the contrary. I believe that the Secretary should be required to follow state law concerning the presumption which, in this instance, con-

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[6] *Compare* Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956), *with* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); see De Sylva v. Ballentine, *supra*; RFC v. Beaver County, 328 U.S. 204 (1946).

[7] See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.PA.L.REV. 797 (1957); BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES, ch. 11 (1949).

trols descent and distribution and thus has the effect of substantive law.

If we apply the law of Oregon, then, the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co., supra.*[8] It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable.

Turning now to the other possible interpretation of the Examiner's orders, I do not believe that his finding has any substantial basis in the evidence. Since the majority did not decide this point, no purpose would be served by reviewing the evidence here. Suffice it to say that careful scrutiny of the entire record satisfies me that the evidence would not furnish any basis for the Examiner's conclusion.

For the foregoing reasons I would reverse the summary judgment for the Secretary and remand the case to the District Court with directions to vacate the Secretary's order insofar as it relates to the estate of John Thomas and remand the case to the Secretary for further proceedings.

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[8] The earlier case of Fink v. Prudential Ins. Co., 162 Ore. 37, 90 P.2d 762 (1939), is not to the contrary because, under the circumstances of that case, the Court merely refused to indulge in any *presumption of death*. It did not reach the issue of a presumption as to the time of death.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958.

Civil 859-58

No. 14,813

JOE HAYES, APPELLANT

v.

FRED A. SEATON, Secretary of the Interior, APPELLEE.

United States Court of Appeals for the
District of Columbia Circuit

Filed July 9, 1959—Joseph W. Stewart, Clerk

APPEAL FROM the United States District Court for the District of Columbia.

Before: EDGERTON, DANAHER and BURGER, *Circuit Judges*.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Edgerton.

Dated: July 9, 1959.

Separate dissenting opinion by Circuit Judge Burger.

APPENDIX B

Filed United States Court of Appeals for the District of Columbia Circuit, Oct. 5, 1959. /s/ Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 14,813

JOE HAYES, APPELLANT

v.

FRED A. SEATON, Secretary of the Interior, APPELLEE

Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, *Circuit Judges*, in Chambers.

ORDER

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: October 5, 1959

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 348, reads in part as follows:

> "That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; . . ."

Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372, provides in part as follows:

> "When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

Section 2 of the Act of June 25, 1910, 36 Stat. 855, as amended by the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. sec. 373, provides in part as follows:

> "Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on

alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior; *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior:"

25 C.F.R. pt. 15.1, reads in part as follows:

Administration of estates: The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part.

25 C.F.R. pt. 15.15, reads in part as follows:

Decision. The examiner of Inheritance shall, except as provided in Sec. 15.21, decide the issues of fact and law involved in the proceeding and shall incorporate his findings and conclusions in a decision. Every decision determining the heirs of an Indian who died intestate shall cite the law of descent and distribution in accordance with which the decision was made. Every decision approving the will of an Indian shall state the devisees and legatees who take under the will and the particular property which each is to receive, and shall construe any ambiguous provision of the will.

25 C.F.R. pt. 15.20, reads in part as follows:

Presumption of death. In accordance with the regulations in this part pertaining to other hearings, an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed dead.

Oregon Revised Statute: 41:360 Disputable Presumptions:

(26) A person not heard from in seven years is dead.

Oregon Revised Statutes 111.020:

(3) If the intestate leaves no lineal descendents surviving spouse or mother, such real property shall descend to his or her father . . .

(4) If the intestate leaves no descendents, surviving spouse, father, mother, brother or sister, such real property shall descend to his or her next of kin in equal degree . . .

COPY

Supreme Court, U.S.
FILED
MAY 31
JAMES R. BROWNING, Clerk

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1959

JOE HAYES, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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552247—60——1

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 665

JOE HAYES, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals is reported at 270 F. 2d 319.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1959. A petition for rehearing was denied on October 5, 1959. By order dated December 17, 1959, Mr. Justice Douglas extended to February 2, 1960, the time to file a petition for writ of certiorari. The petition was filed on January 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In probating the will of a deceased Indian allottee of restricted lands under § 2 of the Act of June 25, 1910 (25 U.S.C. 373), the Secretary of Interior determined that under the applicable law of Oregon the devisee under the will, who had disappeared 13 months before the death of the decedent and had not been heard from for over seven years, must be presumed to have survived the decedent and to have died only at the expiration of the seven years' absence. The question presented is whether that determination is subject to judicial review on a claim that the Secretary misinterpreted Oregon law.

STATUTES INVOLVED

Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, provides in part as follows:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. * * *

Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended, 25 U.S.C. 373, provides in part as follows:

> Any persons of the age of twenty-one years having any right, title, or interest in any allot-

ment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: * * *.

STATEMENT

This is an action to set aside orders of the Secretary of Interior directing distribution of the restricted estates of two Indians, John Thomas and his son, Joseph Thomas. The orders were entered under the authority of §§ 1 and 2 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, 373, § 1 authorizing the Secretary to determine the heirs of Indians dying intestate, and § 2 authorizing him to approve the wills of Indians dying testate.

John Thomas died on September 22, 1940, leaving a will devising all his property to his son, Joseph Thomas. Joseph Thomas had disappeared on August 3, 1939, some 13 months before the death of his father, and has not been heard from since. It is undisputed that the circumstances of the son's disappearance were such that he can properly be presumed to have been dead at least since August 3, 1946, seven years after his disappearance. The question ultimately in issue, and which controls the distribution of both

estates, is whether the son was alive or dead on the date of his father's death, September 22, 1940. If the son survived the father, he took the father's estate under the father's will, and both the father's estate and the son's separate estate passed, upon the son's later presumed death, to the son's next-of-kin, his half-brother, whose interest has since descended to the latter's widow, Emma Luton. If, on the other hand, the son is deemed to have died before the father, then the father inherited the son's estate, the father's devise to the son lapsed, and both estates pass to the father's next-of-kin, his first cousin, the petitioner here.

The hearings before the Examiner of Inheritance as to the two estates were consolidated, and on June 20, 1956, the Examiner entered orders awarding both estates to Emma Luton. In the order as to the son's estate, the Examiner held that there was no sufficient evidence to prove when the son died and that he must therefore be presumed to have lived throughout the first seven years of his absence and to have died on August 3, 1946, thus surviving his father and leaving as his sole heir-at-law his half-brother (R. 26A–28A). The order entered in the father's estate approved the father's will and incorporated by reference the finding in the son's estate that the son was presumed to have died on August 3, 1946, thus surviving the father and taking under the father's will (R. 9A–12A). The Examiner denied rehearing (R. 29A–33A).

On petitioner's appeal to the Secretary, the Solicitor of the Department, acting under a delegation

of authority from the Secretary, affirmed the Examiner's order. Noting that the Department adopted the law of the state of the decedent's domicile in resolving such issues (R. 17A), the Solicitor concluded that under the law of Oregon a person presumed dead from seven years' absence is presumed to have continued to live throughout the seven-year period and to have died on the last day of that period. Since there was no sufficient evidence to the contrary, it was held that the Examiner had properly presumed that the son was still alive on the date of his father's death (R. 13A–20A).[1]

Petitioner then brought this action in the United States District Court for the District of Columbia, purportedly under § 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. 1009), to review and set aside the Secretary's decison and to enjoin distribution of the estates pursuant to that decision. The district court dismissed the action without opinion (R. 63A). The court of appeals affirmed, holding that the determination of the son's heirs was expressly made "final and conclusive" by § 1 of the 1910 Act; that the finding that the son survived the father was an essential part of that determination; and hence that that finding was final for all purposes, including the disposition of the father's estate under § 2 of the

[1] The basis for the decision is illuminated by the Solicitor's opinion letter denying petitioner's request for reconsideration. Since that opinion (Exhibit 4 to the Complaint) is not printed in the Joint Appendix, we have set it out in the Appendix, *infra*, pp. 12-21, for the Court's convenience.

Act. It further held that even if the finding were reviewable, it was not "arbitrary or unreasonable" and hence could not be set aside (Pet. 19–21).

Judge Burger dissented, contending that the non-reviewability of the order entered in the son's estate under § 1 could not affect the finality of the order entered in the father's estate under § 2 and that, since § 2, unlike § 1, did not make determinations thereunder "final and conclusive", that order was subject to review under the Administrative Procedure Act. On the merits, he concluded that the presumption applied by the Examiner that death occurred at the end of the seven years' absence was contrary to the law of Oregon as announced in *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372 (Pet. 21–30).[2]

ARGUMENT

While there is room for debate what the law of Oregon is on the issue involved here, it cannot be said that the Secretary's conclusion was arbitrary

[2] Judge Burger's opinion also dealt with alternative contentions made by the Government in the court of appeals that the Secretary was not bound to follow Oregon law and that the decision may have been based on an inference of fact from evidence rather than a legal presumption. Upon further examination of the record and discussions with representatives of the Interior Department, we are satisfied that the Secretary, whether required to do so or not, did intend to base his decision on Oregon law and on a legal presumption of a continuance of life throughout the seven-year period rather than upon an inference of fact. Hence there is now no disagreement on those questions and, since they were not reached by the majority of the court below, they afford no reason for the grant of certiorari.

or irrational,[3] and the only question is whether the decision is open to review by the courts for an alleged error in applying the Oregon law of presumptions. In our view it is clear that the order entered in the father's estate under § 2 of the 1910 Act would not be

[3] There is admittedly language in *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, consisting primarily of the court's quotation of other authorities, suggesting a view of the presumptions contrary to the Secretary's decision. The precise issue in that case, however, was very different from that here. The question there was whether the plaintiff in an action on an insurance policy, having produced enough evidence from which the jury could infer that the insured died on the date of his disappearance, was entitled to have the jury instructed that the *fact* of death could be presumed from the insured's unexplained absence for seven years. All the court actually held was that the presumption of death was not irrelevant in an attempt to prove that death occurred at the date of disappearance—which it would not be even if the presumption, in the absence of any evidence, were that death occurred at the end of the period. Cf. *Peak* v. *United States*, 353 U.S. 43. The court's reliance, in support of that result, on broad statements of other authorities having implications going beyond the precise point does not necessarily mean that the Oregon court endorsed all of those implications or would feel bound to follow them should the issue be squarely presented. On the other hand, the issue in *Massachusetts Bonding & Ins. Co.* v. *Helman*, 62 F. 2d 902 (C.A. 9), relied on by the Secretary (*infra*, p. 20), was in all material respects identical to that here, and there the Ninth Circuit, applying Oregon law, held that in the absence of evidence a person presumed dead after seven years' absence must be presumed to have survived an ancestor dying during the seven-year period. Whether the precise holding of the Ninth Circuit, on the one hand, or the broad implications of quotations relied on by the Oregon Supreme Court in deciding a quite different question, on the other, more accurately reflects the law of Oregon on the issue may be mooted, but the Secretary's decision to follow the Ninth Circuit in the absence of more conclusive authority in the state courts can hardly be labelled unreasonable.

so reviewable even if it stood alone. Hence we need not rely upon the further ground adopted by the court of appeals that, even if the determination in the father's estate would otherwise be reviewable, it was not reviewable here because the same finding was an essential part of the determination of the son's heirs under § 1 and was there expressly made "final and conclusive."

1. No reason appears why Congress would have intended the same kind of finding to be subject to a different scope of review when made in an order probating a will under § 2 of the Act than when made in determining the heirs of an intestate under § 1. The omission from § 2 of the words "final and conclusive" found in § 1 seems to reflect only a lack of awareness that the disposal of the estate might turn on questions extrinsic to the validity of the will itself and of the same nature as those involved in determining the heirs of an intestate. If any distinction as to reviewability is to be drawn from the different language of the two sections, it should be made, not on the basis of the formal character of the proceedings in which the determination is made (whether involving a will or not), but on the basis of the nature of the issue determined, distinguishing between issues of a character common to testate or intestate estates (such as survivorship) and those involving the Secretary's exercise of the special powers given him by § 2 with respect to wills—namely, the power to prescribe regulations governing the making of wills and the power to approve or disapprove wills. Here, of course, as the court of appeals pointed out (Pet. 20–21), the issue does not in

any way involve matters of the latter character and is precisely the same as it would be if the father had died intestate. The sole issue was that of survivorship, and the fact that the son, if he survived, would take by devise rather than by intestate succession is essentially irrelevant and ought not affect the reviewability of the determination of that issue. In short, determinations of issues not going to the validity of a will should be equally "final and conclusive" whether made in intestate or will probate proceedings, and a distinction can meaningfully be drawn, if at all, only as to issues going to the validity of wills. And under that view of the statute, there is nothing inconsistent between the court of appeals' decision in *Homovich* v. *Chapman*, 191 F. 2d 761, reviewing the Secretary's determination of the validity of a will, and its refusal to review the Secretary's finding here on the question of survivorship.

2. Moreover, even if the "final and conclusive" standard of § 1 could not in terms be applied to determinations made in will probate proceedings, it would not follow that such determinations would be subject to the broad scope of review asserted by petitioner. Historically, Congress has entrusted the settlement of disputes as to Indian matters, as in other land matters, to the Department of the Interior and has never affirmatively provided for general review by the courts, by appeal or otherwise, of departmental decisions. *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; *Wilbur* v. *United States*, 281 U.S. 206. Hence, as those cases show, only the very limited review by mandamus, requiring a showing that the Secretary

has failed to follow the clear mandate of Congress, is available in this area. No broader review is required since, as this Court has often stated, *e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, the power of Congress in the administration of Indian affairs is "plenary."

Against that background, the significance of the omission from § 2 of the "final and conclusive" language of § 1 is much diminished. The effect of § 1 is to preclude even the limited mandamus review in heirship cases, and the silence of § 2 at most simply permits the mandamus standard of review to be applied. That was essentially the position taken by the court below in *Homovich, supra*, when, after holding that the Secretary's determination of the validity of a will was not "final and conclusive" and was subject to review, the court said nevertheless that—

> if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. * * * Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity. [191 F. 2d at 764.]

Here there is no contention that the Secretary was not acting within the scope of his authority, and hence the exercise of his judgment and discretion in resolving the question of survivorship, even if based on an erroneous view of Oregon law, is not subject to re-examination by the courts.

The Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) does not justify a greater scope

of review. By its own terms, that Act precludes judicial review where "agency action is by law committed to agency discretion" (§ 10). This case falls within that exception. Moreover, as the court below stated in *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 933, certiorari denied, 350 U.S. 884, the Administrative Procedure Act "does not render competent a court which lacks jurisdiction on any other ground." The Administrative Procedure Act "is merely declaratory of the existing law of judicial review and * * * it neither confers jurisdiction on this court above and beyond that which it already has," nor grants more rights than previously existed. *Olin Industries* v. *National Labor Relations Board*, 72 F. Supp. 225, 228 (D. Mass.); *Brisbois* v. *Hague*, 85 F. Supp. 13, 14 (D. Mass.); *Transamerica Corp.* v. *McCabe*, 80 F. Supp. 704, 707 (D. D.C.); *Atchison, Topeka and Santa Fe Ry. Co.*, v. *United States*, 130 F. Supp. 76, 78 (E.D. Mo.), affirmed, 350 U.S. 892.

Conclusion

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully,

J. Lee Rankin,
Solicitor General.

Perry W. Morton,
Assistant Attorney General.

Roger P. Marquis,
Robert S. Griswold, Jr.,
Attorneys.

May 1960.

APPENDIX

U.S. DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C.

April 1, 1958.

Mr. RALPH CURRIN,
Attorney at Law,
P.O. Box 775,
Pendleton, Oregon.

DEAR MR. CURRIN: As one of the attorneys of record representing Joe Hayes in his appeal, decided by the Acting Solicitor on November 6, 1957 (IA–848), in the matter of the estates of John Thomas, deceased Cayuse allottee No. 223 (Probate No. 16056–52) and Joseph Thomas, deceased Umatilla allottee No. 877 (Probate No. 9599–56), you were advised by our letter, dated December 18, 1957, addressed to Koerner, Young, McColloch & Dezendorf, who appear as co-counsel with you in representing Joe Hayes, that time would be granted until January 10, 1958, to file with the superintendent a motion for reconsideration of the appeal. The superintendent was authorized and directed to withhold distribution pending further action.

The decision of the Solicitor is final under the regulations, but in view of the representations made concerning newly-discovered evidence, you were afforded the above time in which to perfect and file a motion for reconsideration. Specific instructions were given that such a motion should contain a detailed recitation and description of the newly-dis-

covered evidence, together with an explanation for the failure to procure the evidence for presentation at the hearings which have been held in these cases. You were further advised that if a timely motion were filed in conformity with the procedure stated, this office would then determine the matter on the basis of the showing made, and would either authorize further proceedings or direct the superintendent to distribute the estate in accordance with the Examiner's decision of June 20, 1956.

The motion was timely filed with the superintendent, which included the certification that copies thereof had been served on the adverse party and the Examiner of Inheritance. No response to the motion has been received from the adverse party, Mrs. Emma J. Luton who is not represented by an attorney.

It is contended that the alleged newly-discovered evidence is based upon further facts discovered upon an examination of the death records maintained by the Multnomah County Coroner, Portland, Multnomah County, Oregon. The examination revealed that an unidentified body was recovered from the river at Irving Dock on June 12, 1939, by the Harbor Patrol. The coroner's report, "Exhibit A" of the Motion, states that the body had probably been in the water one week to ten days. The report gives a description of the body recovered, the clothing worn and the property found on the body. The coroner's report indicates a similarity of description of the body recovered to that of Joseph Thomas, in complexion, age, height and weight. The similarity of clothing is limited to a black shirt with three glass buttons on the cuffs. The evidence adduced at the hearings by the testimony of Tony Benson, was that Joseph Thomas at the time of his disappearance was wearing his, Benson's black shirt. There is no evidence, however, that the black shirt worn by Joseph Thomas had three glass buttons

on the cuffs. Tony Benson also stated that Joseph Thomas was wearing, at the time of his disappearance, white corduroy trousers, whereas the coroner's report describes the trousers found on the recovered body as yellow or tan canvas.

The evidence adduced at the hearing by the testimony of Wade Minthorn, describes Joseph Thomas as having scars on various parts of his body, scalp, arms and hands, which resulted from fights in which he had been engaged. The coroner's report, on the other hand, states that no scars or marks were noted on the body recovered. It appears from the testimony of Joe Hayes, that he had viewed, at Portland, the remains of a body recovered from the river, which he failed to identify as being that of Joseph Thomas. He stated that he "couldn't tell who it was or whether it was an Indian or a white man." He further testified that Henry Galloway, the officer from the Agency, was with him at the time and he also had viewed the body. The notation on the coroner's report, Exhibit A, states that a key found on the body recovered was turned over to Mr. Galloway of the Umatilla Reservation. It appears that the body described in the coroner's report was the same as the one viewed by Joe Hayes and Mr. Galloway. Joe Hayes also testified that Joseph Thomas had been cut up at one time, while drunk and quarrelsome at Lapwai. Yet he did not testify as to witnessing any scars on the recovered body viewed by him. The Umatilla Indian Agency reported that it had no record of scars or marks on Joseph Thomas, but does record him as being 5 feet 8 inches tall and his weight about 170 pounds. The recovered body is shown on the coroner's report to have been 5 feet, 10 inches tall, and to have weighed 150 pounds.

It is quite evident that the evidence presented with the motion is not newly-discovered, but was available

at the time of the hearing and was partially covered at least by the testimony of the appellant, Joe Hayes. Moreover, the facts discovered upon the examination of the death records maintained by the coroner do not establish with any degree of certainty that the body recovered was that of Joseph Thomas, but on the contrary indicate that it was not.

Although we were not so advised by you or other attorneys of record for the appellant, Joe Hayes, we were advised by a hand-delivered letter, dated January 24, 1958, from attorney Leon Benezra of Washington, D.C., that he had been requested by you to enter his appearance in behalf of Joe Hayes, and enclosed a request for reconsideration on the grounds of gross error in law, together with his brief in support thereof. This latter request for reconsideration is not made in accordance with your request that we reconsider this case on the basis of newly-discovered evidence, and furthermore, that filing was not timely. Because of these factors, including the fact that the present matter was to be reexamined solely on the claim of newly-discovered evidence, which has not been established, the request for reconsideration is denied.

Nevertheless, without waiving the grounds for denial of the request for reconsideration, as stated above, the motion and brief on the points of law have been reviewed, even though briefs covering matters of law were heretofore presented both with the petition for rehearing and the appeal. The order of the Examiner of Inheritance and our opinion on the appeal both contain the finding that in order for the appellant, Joe Hayes, to inherit from John Thomas, the father of Joseph Thomas, Joe Hayes must show that Joseph Thomas died prior to September 22, 1940, the established date of the death of the father,

John Thomas. It is contended in the motion that the finding by the Examiner of Inheritance, presuming Joseph Thomas to be dead on August 3, 1946, likewise presumed the continuance of life of Joseph Thomas until August 3, 1946, and that there is accordingly, a fundamental error of law which has heretofore escaped the attention of persons interested in the adjudication of this matter.

Reference is made to our citation and the quotation from *Davie* v. *Briggs,* 97 U.S. 628 (1878), on page 3 of our decision, emphasizing that the presumption of the continuance of life, or the presumption of death, cannot be relied upon to establish a date of death of a person who had not been heard of for seven years. The court said in this case that " * * * if any one has to establish the precise period during those seven years at which some person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor on the other, upon the presumption of the continuance of life." It is contended that the Examiner erroneously presumed the "continuance of life" of Joseph Thomas until August 3, 1946, at which point he was presumed to be dead, and therefore assumed that Joseph Thomas was in being at the time of the death of his father, John Thomas, on September 22, 1940.

It is further contended that the presumption that Joseph Thomas was in existence at the time of John Thomas' death is of importance in the adjudication of this matter because of the rule in the law of wills that "a devise or bequest to one who was not in being when the devise or bequest was to vest, was void and without legal effect." (Page on Wills, sec. 216, at p. 1957.) The question raised is whether Joseph Thomas was in existence at the time of the death of John Thomas on September 22, 1940, so as to take the de-

vise and inherit the estate willed to him. It is contended that if Joseph Thomas was not in being, the devise to him would not vest but as a consequence it would be void and the appellant, Joe Hayes, as the only heir of John Thomas, would inherit the latter's estate. It is further contended that a presumption that Joseph Thomas was in being at the time of John Thomas' death is erroneous and contrary to the law as found in *Davie* v. *Briggs, supra,* and that the burden is upon Emma Luten to introduce evidence to prove that Joseph Thomas, from whom her rights are derived, was in being on September 22, 1940, otherwise the devise to Joseph Thomas never vested, and was void.

The opinion of the court in *Davie* v. *Briggs, supra,* and a great many other cases, is to the effect that in an unexplained absence of a person for seven years the law raises no presumption as to the precise time of his death, the presumption being only that he is dead at the end of the seven years, but that such presumption does not extend to the death having occurred at the end of or at any particular time within that period but leaves it to be adjudged as a matter of fact that it was an earlier or a later date. However, in the absence of evidence to the contrary, or until a different presumption arises, the continuance of the life of a person to the common age of man will ordinarily be assumed.

An Oregon Statute, ORS 41.360(33), governs the presumption of continuance of life denied by the appellant in this case:

> A thing once proved to exist continues as long as is usual with things of that nature.

This Code provision was relied upon in a similar situation in *Fink* v. *Prudential Ins. Co. of America,* 162

Or. 57, 90 P. (2d) 762 (1939) at page 774, where the Court stated:

> We start our inquiry with the knowledge that Fink was living the day following his departure from Portland, and since the law authorizes a presumption that "a thing once proved to exist continues as long as is usual with things of that nature" (§ 9-807, subd. 33, Oregon Code, 1930), a conclusion is warranted that Fink, whose life expectancy was between twenty-eight and twenty-nine years at the time of his departure (Table of Mortality, 41 C.J., p. 216), was still alive when this action was begun, unless the record furnishes sufficient reason for believing the contrary. Therefore the burden of proof rests with the plaintiff to overcome the presumption of life and to furnish evidence from which death may be inferred.

In addition to the statutory presumption of continuance of life here available, a common law presumption can be inferred from the holding of the Supreme Court in *Fidelity Mutual Life Association* v. *Mettler,* 185 U.S. 308. The Supreme Court in this case found no objection to the instructions of the trial court to the jury:

> Absence alone cannot establish the death of Hunter, *for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live.* [Emphasis supplied.]

In *Occidental Life Insurance Co.* v. *Thomas,* 107 F. (2d) 876 (9th Cir., 1939), the Circuit Court of Appeals stated:

> * * * that a person who was alive when last seen is presumed to continue living until the contrary is shown;

See also *United States* v. *Wildcat;* 244 U.S. 111 (1917); *Quaker Realty Co.* v. *Starkey,* 136 La. 28, 66

So. 386 (1914); *Ferris* v. *American Ins. Union*, 245 Mich. 548, 222 N.W. 744 (1929); *Hoyt* v. *Newbold*, 45 N.J.L. 219 (1883); *English* v. *United States*, 25 F. (2d) 335 (D.C. Md 1928); *Brown* v. *New York Life Ins. Co.*, 57 F. (2d) 62 (8th Cir., 1932). This rule of law also is pointedly stated to be the existing law in 25 Corpus Juris Secundum (Death) section 5, as follows:

> One who is shown to be alive at a given time is presumed to remain alive until the contrary is shown by proof or, in the absence of proof, until a different presumption arises.

In the presumption of death arising from the absence of a person for seven years, such person cannot be presumed to have died before the expiration of that period, and in the absence of any evidence to the contrary, it will be presumed or inferred that he lived during the entire period. *Howard* v. *Equitable Life Assur. Soc.*, 197 Wash. 230, 85 P. (2d) 253 (1938); *Ferris* v. *American Ins. Union, supra.* At the end of seven years the legal presumption refers not only to the fact of death but also to the time of death, and in the absence of any fact except the absence of a person for seven years, without having been heard of, the presumption is that he died on the last day of the seven years. *Meyer* v. *Modreperla*, 68 N.J.L. 258, 53A. 477 (1902); *Fanning* v. *Equitable Life Assur. Soc.*, 264 Pa. 333, 107A. 715 (1919). On the issue as to whether Joseph Thomas survived his father, John Thomas, it is proper to assume, as the law does, that the life of Joseph Thomas, once shown to exist, is presumed to continue until death is presumed by reason of the unexplained seven-year absence, and that he survived one who died during the seven year period. *In re Buck's Estate*, 204 Mo. App. 1, 220 S.W. 716 (1920).

Knowing that Joseph Thomas was alive in 1939, it must be assumed that his life continued until his death was established by facts proving to the contrary, or until the presumption of his death was established by his unexplained disappearance and absence for a period of seven years. In the absence of proof of an earlier death, he must be assumed to have been living on September 22, 1940, and on each day during the seven years, and that after an absence of seven years he is presumed dead, but not before.

An Oregon case comparable to the case under consideration was decided in *Massachusetts Bonding & Ins. Co.* v. *Holman,* 62 F. (2d) 902 (9th Cir., 1933). In that case a testator, Phillip J. Worrell, bequeathed $5,000 to a son, William Worrell, who disappeared before the death of the testator. The presumption of death established seven years after William's disappearance, was six years after the death of the testator. It was contended that the legacy lapsed because William died before the execution of the will, and that he predeceased the testator. The court said:

> * * * William Worrell being alive, the presumption is that he continues to live until his death is established by satisfactory proof, or expiration of the period of limitation from absence, or being not heard from for more than seven years, and therefore dead by presumption of law. The presumption of life changed at the close of the last day of the seven year period, and the presumption at this time arises that he is dead, and obviously William Worrell was alive at the testator's death. * * *.

In the case of *In re Christin's Estate,* 188 Cal. App. 625, 17 P. (2d) 1068 (1933), the question was whether a father who had been missing for seven years had predeceased his child so as not to be entitled to inherit from the child. The court stated that:

> Although the general rule is that the presumption of life continues during the entire period of seven years following the disappearance of the person, such presumption may be overcome by evidence showing either that within such time the missing person was subject to some specific peril, or that other circumstances or conditions intervened sufficient to quicken the ordinary seven year period of time necessary to create the presumption of death.

In the light of the above circumstances, including the lack of convincing newly-discovered evidence, and upon full consideration of the legal question propounded which we do not regard as well founded, your request for a reconsideration of the decision on the appeal is denied. The superintendent of the Umatilla Agency is authorized, by virtue of this letter, a copy of which has been sent to him, to make distribution of the assets of this estate in accordance with the Examiner's decision of June 20, 1956.

Sincerely yours,

EDMUND T. FRITZ,
Deputy Solicitor.

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Supreme Court, U.S.
FILED
JUN 29 1960
JAMES R. BROWNING, Clerk

No. [redacted] -30

In The

Supreme Court of the United States

October Term, 1959

Jess Hayes,

Petitioner

v.

Fred A. Seaton, Secretary of the Interior,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 665

JOE HAYES,

Petitioner

v.

FRED A. SEATON, Secretary of the Interior,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

The petition for certiorari filed January 28, 1960, by the American Indian, Joe Hayes, respectfully directed this honorable Court's attention to the variance between the grounds asserted by the Secretary of the Interior as the basis for his determination in the District Court and those stated in the Court of Appeals.

The Government's brief in opposition to the petition for certiorari, filed May 31, 1960, acknowledges that the Government may have misstated to the Court of Appeals the substantive grounds for its determination of this case both as to the facts and the law.[1]

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[1] See footnote on page 6 of Respondent's brief in opposition.

BY MISSTATING THE SUBSTANTIVE GROUNDS FOR ITS DETERMINATION THE GOVERNMENT IMPEDED JUDICIAL REVIEW IN THE COURT BELOW, DENIED PETITIONER DUE PROCESS AND IRREPARABLY PREJUDICED PETITIONER'S CASE.

In order to clarify the record, petitioner respectfully presents below a detailed comparison of the conflicting grounds for the Secretary's determination stated by the Government, respectively, to the District Court and the Court of Appeals.

In the District Court, the Government stated the grounds for its determination as follows:

> "No evidence was presented on behalf of Emma J. Luton tending to show that Joseph Thomas survived his father. Therefore, the situation is that Joseph Thomas disappeared in 1939, that his father died September 22, 1940, *but that there is no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father.*"[1] (Emphasis supplied).
>
> "'If there is evidence of the facts, then no such presumption would be necessary . . . The Secretary of the Interior or his delegated representative, *found that there was no evidence sufficient to sustain a finding of fact as to the date of death of Joseph Thomas*, and, consequently made a presumption following the law of the State of Oregon.[2] (Emphasis supplied)

Thus we have a clear and unequivocal statement by the Government in the District Court that its determination in the case was grounded on a presumption under

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[1] The Government's "Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings or for Summary Judgment" filed in the District Court on June 30, 1958, at page 11.

[2] The Government's "Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment" filed in the District Court on August 19, 1958, at page 8.

Oregon law and *that there was no finding of fact made by the Government* because there was "no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father".

Notwithstanding the above, the Government shifted its position 180 degrees and asserted diametrically opposed grounds in the Court of Appeals. Thus, in the Court of Appeals the Government stated the grounds for its determination as follows:

> "The determination which appellant seeks reviewed is one of fact." [1]
>
> "Thus, in this case we have a legitimate inference of fact adequately supported by the evidence . . . The inference of fact that the son's life continued at least until his father's death 13 months later is thereby firmly established beyond dispute at this time." [2]
>
> "Nowhere in that determination does the Examiner make use of the presumption of law to show the continuance of life of the son past the date of the father's death. On the contrary . . . the correctness of the Examiner's decision can be shown by sole reliance upon an inference of fact and without the presumption of law." [3]
>
> "The presumption was not essential to the ultimate determination." [4]

Thus, we have a categorical statement by the Government in the Court of Appeals that the presumption of law was unessential to its determination; that its determination was grounded on a finding of fact supported by the evidence; and that its determination could be supported solely on this finding of fact which was "firmly established beyond dispute at this time"

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[1] Respondent's brief in the Court of Appeals at page 7.

[2] Ibid. p. 13.

[3] Ibid. pp. 13, 14.

[4] Ibid. pp. 13, 14.

But, as we have seen, IN THE DISTRICT COURT, THE GOVERNMENT CATEGORICALLY DISAVOWED THE EXISTENCE OF A FINDING OF FACT BECAUSE "THERE WAS NO EVIDENCE SUFFICIENT TO SUSTAIN A FINDING OF FACT" AND CONSEQUENTLY THE GOVERNMENT "MADE A PRESUMPTION FOLLOWING THE LAW OF THE STATE OF OREGON".

Why these discrepancies? Petitioner submits, it is apparent that the Government was not aware of the advantages which might flow to it, if it could but persuade the Court of Appeals that its determination was indeed grounded solely on a finding of fact supported by the evidence. For as the Government observed in its presentation to the Court below:

> "An administrative finding of fact will not be disturbed without allegation that such fact was not supported by the evidence. Therefore, where there is neither such an allegation, nor grounds presented therefor, the court may not disturb a finding of fact."[1]

It is apparent therefore, that the Government by constant reiteration that its determination could be supported solely on a finding of fact, supported by the evidence, was attempting to place the case squarely within the area of judicial unreviewability. That it succeeded in doing so is manifest by a reading of the majority opinion of the Court below, which stated: "Even if it were reviewable and in our opinion erroneous, we could not disturb it, for it was not arbitrary or unreasonable. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"[2]

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[1] Respondent's brief in the Court of Appeals at page 7.

[2] 270 F. 2d 321.

The majority of the Court below accepted the Government's representations as to the substantive grounds for its determination. But, Judge Burger apparently had some doubts regarding these representations and they are reflected in his dissent as follows:

> "It is not clear from the record whether the Examiner of Inheritance *presumed* the son, Joseph Hayes, to have died exactly seven years after the date of his disappearance or whether he made this finding by weighing all the evidence. More likely he did the former, but whichever he did, his action seems clearly erroneous to me. In other words, if he made a presumption of law, he did so upon an improper interpretation of applicable law. If he made a factual determination, it is not supported by substantial evidence *on the record as a whole*." [1]

By why should there have been any doubt whatsoever in the mind of Judge Burger as to the substantive grounds for the Government's determination. For as Mr. Justice Frankfurter stated in *Security and Exchange Commission* v. *Chenery Corporation* et al; ". . . the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed." "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." [2]

But we are faced in the instant case with no mere failure of the Government to disclose clearly the grounds for its determination. For what is involved here is an unmistakable misstatement by the Government to the Court of Appeals of the grounds for its determination, which the Government now belatedly concedes in its presentation to this court as follows:

> "Judge Burger's opinion also dealt with alternative contentions made by the Government in the court of

[1] 270 F. 2d 323, 324.

[2] 318 U.S. 80, 94 (1942).

> appeals that the Secretary was not bound to follow Oregon law and that the decision may have been based on an inference of fact from evidence rather than a legal presumption. Upon further examination of the record and discussions with representatives of the Interior Department, we are satisfied that the Secretary, whether required to do so or not, did intend to base his decision on Oregon law and on a legal presumption rather than upon an inference of fact."[1]

Is it unreasonable for this American Indian to ask why the Government failed to disclose to the Court of Appeals the real grounds for its determination? Is it unreasonable for the petitioner to ask why the Court of Appeals, while the matter was still pending before it, was not apprised by the Government that the grounds it asserted as the basis for its determination were misstated as to fact and law? Is it unreasonable for petitioner to inquire why the Government waited until the case was beyond the jurisdiction of the Court of Appeals before this intelligence was communicated to the judiciary, thereby denying the Court below the opportunity to consider whether it desired to alter its position in view of the new posture of the case? Is it unreasonable for petitioner to feel that by misstating the grounds for its determination the Government impeded the judicial review of the Court of Appeals, denied him due process and irreparably prejudiced his case?

THE ONLY REAL SUBSTANTIVE ISSUE IN THE CASE —WHETHER THE SECRETARY ERRED IN HIS APPLICATION OF OREGON LAW—WAS NEVER PASSED UPON BY THE MAJORITY IN THE COURT BELOW.

In its brief in opposition to the petition for certiorari the Government states:

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[1] See footnote on page 6 of Respondent's brief in opposition.

> "Upon further examination of the record and discussions with the representatives of the Interior Department, we are satisfied that the Secretary, whether required to do so or not, did intend to base his decision on Oregon law . . ."[1]

If the Secretary, as now stated, did intend to base his decision on Oregon law, the Government not only failed to disclose this intention to the Court of Appeals, but as the record will show, it was expressly disavowed. In this connection the Government stated in its brief to the Court of Appeals:

> "The Secretary is not required to follow State law, except for the law of descent and distribution . . ."[2]
> "The Oregon law on presumptions cannot be included in the category of laws normally intended by the terms 'descent and distribution'."[3]

> "Thus the Secretary is fully able to apply the federal rule as to the presumption of continuance of life, for to do otherwise would be clearly in error and inconsistent with the early decisions on similar issues before the Secretary."[4]

Thus the record shows that the Government stated to the Court of Appeals that Oregon law was inapplicable and that the substantive law that it was relying upon as the basis for its determination was "federal", and "to do otherwise would be clearly in error." Now we are told that the Secretary did intend to apply Oregon law after all; and that the Secretary relied on the decision in *Massachusetts Bonding & Ins. Co.* v. *Holman*, 62 F. 2d 902 (C.A. 9, 1933). An exhaustive search of the legal memoranda and brief submitted by the Government in the

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[1] Government's brief in opposition at page 6.

[2] Government's brief in the Court of Appeals, at page 8.

[3] Ibid. at page 15.

[4] Ibid. at page 14.

District Court and the Court of Appeals fails to disclose any mention whatsoever by the Government of this case. Thus the Court below was never afforded an opportunity to review judicially this 9th Circuit case which the Government belatedly alleges is the "Oregon Law" upon which the Secretary relies as the basis for his determination.

A careful reading of the *Massachusetts Bonding* case, supra, will reveal that the Oregon Statute referred to in this decision was Section 10-510 of the Oregon Code Annotated which reads:

> "When any estate shall be devised to any child, grand child or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator."

This Oregon statute was a remedial statute designed to protect lineal descendants of a devisee who predeceased the testator, and to prevent the lapsing of the devise. The issue of the case was whether this remedial statute was to be given a strict or liberal construction. This Oregon Statute clearly has no bearing in the instant case because Emma Luton (to whom the Secretary would distribute the Estate of John Thomas), manifestly, is not a lineal descendant of the devisee Joseph Thomas. Moreover, a careful reading of the opinion of the 9th circuit Court of Appeals in the *Massachusetts Bonding* case, supra, will reveal that although the District Court may have predicated its decision on this Oregon statute, the Circuit Court indicated that its decision did not rest on a construction of this Oregon statute, at all. For as the Court stated: "This statute has not been construed by the court of the State . . ." and "It is not necessary to examine the Oregon statute, as the view we take upon the other point is decisive."[1] Since the 9th Circuit did

[1] 62 F. 2d 902, 904 (1933).

not rely on the Oregon Statute and since no opinions of the Oregon Courts were cited as authority for its determination, what was the basis for the Courts opinion? A reading of the opinion in the case will reveal that the Court, consistent with the then prevailing doctrine of *Swift* v. *Tyson*[1] was applying "federal general law" in its determination in the *Massachusetts Bonding* case, supra. Yet, this is the case which the Government now asserts is the "Oregon Law" upon which its determination is based.

A clear exposition of the Oregon law which governs in the instant case was made by Judge Burger in his dissent, when he said:

> "If we apply the law of Oregon, then the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co.* supra. It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable."[2]

But as the Government itself concedes, the question whether Oregon law was correctly or reasonably applied by the Government was never reached by the majority of the Court below. Petitioner cannot help but feel, on the record of the case, that the judicial deliberations of the court below were rendered futile by the failure of the

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[1] 16 Pet. 1 (1842).

[2] 270 F. 2d 319, 325 (1959); It should be noted that *Hefford* v. *Metropolitan Life Insur. Co.*, 173 Or. 353, 144 P. 23 695, was decided by the Supreme Court of Oregon in 1944, eleven years after the 9th Circuit Court of Appeals' decision in *Massachusetts Bonding & Ins. Co.* v. *Holman* which appeared in 1933.

Government to disclose to the court the real grounds for its determination. Moreover, the efforts and substantial sums expended by this Indian petitioner, which he could ill afford, were entirely wasted because the majority never reached the real substantive issue of the case. Equally shocking, however, is that the Department of the Interior, having rendered the Court of Appeal's judicial review ineffectual, would now choke off this Indian petitioner's only remaining avenue to a judicial review of the substantive issue in this case.

In the past this Court has clearly indicated that it would review cases where the governmental agency failed to disclose clearly the grounds for its determination. For as Mr. Justice Frankfurter has said: "This increasing tendency of the courts to scrutinize the legal grounds given by administrative agencies for their actions may well promote greater responsibility in the agencies exercise of authority and in their justification of that exercise."[1]

DESPITE THE GOVERNMENT'S CONTENTION, UNDER THE GENERAL ALLOTMENT ACT, THE SECRETARY IS OBLIGED TO APPLY STATE LAW.

In its brief in opposition to the petition for certiorari the Government states that ". . . the Secretary *whether required to do so or not*, did intend to base his decision on Oregon law . . ."[2] (Emphasis Supplied). Thus the Government takes the position that whether so called "federal general law" or State law is applied by the Government in determining Indian probate matters, is optional with the Secretary of the Interior.

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[1] Mr. Justice Frankfurter, "John Marshal and the Judicial Function", 69 H.L.R. 217, 233 (1955).

[2] See footnote on page 6 of Respondent's brief in opposition.

But, as Judge Burger states in his dissent: ". . . the Secretary is bound by the General Allotment Act to follow state laws in matters concerning descent and distribution. 24 Stat. 389 (1887), as amended, 25 U.S.C. sec. 348."[2] This is also the view of the Court in *Peoria Tribe or Band of Indians* v. *Wea Townsite Co. et al.* 117 F. 2d. 940, 942 (C.A. 10, 1941).

The Government, by its own assertion, would leave the door open to the application of so called "federal general law" or State law, in this or any other case, as it chooses and as expediency would dictate, despite the express mandate of the Congress that State law must be applied by the Secretary.

This Governmental assertion of optional power leaves unresolved this question of Federal statutory interpretation and the constitutional question whether the Executive with regard to Indian probate matters is enforcing the express mandate of the Congress.

These unresolved questions not only affect the individual Indian petitioner Joe Hayes, they also affect about a quarter of a million Indians who are subject to the probate jurisdiction of the Secretary of the Interior.

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[2] 270 F. 2d 319, 325.

CONCLUSION

For the foregoing reasons, and those advanced by petitioner in his earlier submission to this Court, it is respectfully submitted that the petition for writ of certiorari should be granted.

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June 29, 1960

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 3 1960
JAMES R. BROWNING, Clerk

No. 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

JOE HAYES,

Petitioner

v.

FRED A. SEATON, Secretary of the Interior,

Respondent

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 30

JOE HAYES,

Petitioner

v.

FRED A. SEATON, Secretary of the Interior,

Respondent

PETITION FOR REHEARING

Joe Hayes, an American Indian of the Umatilla Tribe in Oregon respectfully petitions this Honorable Court to rehear the petition for certiorari in this case.

Exhibit "A" appearing at the end of this petition contains substantial evidence not previously presented relating to the grounds which served as the bases for the Agency's determination in this case.[1]

Petitioner contends that there has been a lack of due process due to the failure of the Court of Appeals to rule on the substantive issue in this case which was caused by the Government's misstatement of the substantive grounds which were the bases for the Agency's determination.

This case turns on the single question of whether the devisee, under his father's will, Joseph Thomas, survived his father John Thomas.

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[1] Exhibit "A" consists of Sheets 1 and 4 of the "Summary of Report on Heirs" of the Examiner of Inheritance, dated July 29, 1941.

The Government stated in the District Court that there was "no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father", and that the Agency's determination was grounded on a presumption under Oregon Law. There being no issue of fact, both petitioner and the Government moved for summary judgment on the substantive question of whether Oregon law had been properly applied by the Agency in the case. The District Court decided for the Government and petitioner appealed to the Court of Appeals.

In the Court of Appeals the Government completely shifted its position. Its previous position notwithstanding, the Government represented to the Court that the Agency determination that Joseph Thomas survived his father John could be supported *solely* on a finding of fact supported by the evidence. The Government further stated that it had not relied on Oregon law; that Oregon law was inapplicable; that "federal" law governed in the case and that "to do otherwise would be clearly in error."[1]

Thus the substantive grounds represented by the Government to the District Court and those represented to the Court of Appeals as being the bases for the Agency's determination were diametrically opposed and fundamentally irreconcilable. This variance was belatedly acknowledged by the Government in its brief to this Court in opposition to the petition for certiorari, when it stated that the "Secretary . . . did intend to base his decision on Oregon law and on a legal presumption rather than upon an inference of fact."[2]

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[1] In contrast "Sheet 1", line 4 of Exhibit "A" indicates beyond question that the heir of John Thomas was determined "in accordance with the laws of the State of Oregon". "Sheet 4" of Exhibit "A" indicates that there was no evidence or finding of fact to show that Joseph Thomas did or did not survive his father John Thomas.

[2] See footnote on Page 6 of Respondent's brief in opposition to the petition for certiorari.

The Government still leaves unexplained its failure to advise the Court of Appeals that it had intended to apply Oregon law and a legal presumption rather than an inference of fact. The Government fails to explain why it permitted the Court to rule on grounds which admittedly were specious.

In the landmark case of *Security and Exchange Commission* v. *Chenery Corp. et al.*, this Court stated:

> ". . . the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed."
> "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." [1]

The review of the Court of Appeals was predicated on legal and factual grounds which the Government now belatedly admits were specious. By failing to disclose the real grounds for its determination, and substituting other and specious grounds the Government diverted the attention of the Court of Appeals from ruling on the question of whether the Government properly applied the law of the State of Oregon in this case. We are faced with the unpleasant fact that because of the Government's conduct of this case there has been no ruling at the appellate level on the only substantive issue of the case.

Elementary standards of justice and fair dealing require that this Indian, a ward of the Government, be afforded an appellate ruling on the substantive issue of the case.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that his petition for certiorari be granted, or in the alternative, that the case be remanded to the Court of Appeals for a ruling on the unresolved question of

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[1] 318 U.S. 80, 94 (1942).

whether the Agency correctly applied the law of the State of Oregon in its determination.

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I certify that the foregoing petition is presented in good faith and not for delay and that it is restricted to the grounds above specified.

LEON BENEZRA

EXHIBIT A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
Field Service

(Received Office of Indian Affairs Jul 29 1941 46742)

Salem Oregon
July 21, 1941

SUMMARY OF REPORT ON HEIRS

Estate of John Thomas, deceased Umatilla Allottee No. C-223, died Sept. 22, 1940, aged 52, hearing held Nov. 18, 1940 at Umatilla Indian Agency, Pendleton, Oregon.

Heirs, at the date of hearing, in accordance with the laws of the State of Oregon.

Heir	Relationship	Share
Joseph Thomas,	son,	All.

The trust or restricted estate of the decedent consists of:

Original allotment, appraised at (Fee Patent)	$———
Inherited lands, appraised at	18,200.00
Cash, securities, or other personal restricted estate appraised at	389.03
Total:	$18,539.03

No dower, curtesy, or homestead rights involved.

/s/ Wilburt Bokker
WILBURT BOKKER
Special Examiner of Inheritance.
Reviewed and approved:

/s/ Joseph Coursey
JOSEPH COURSEY
Examiner of Inheritance.

Verified Aug 14 1941

By /s/ A. A. Mulyner
Chief, Probate Division.

* * * *

From correspondence in the file of Joseph Thomas, decedent's son, Umatilla Allottee 877, it appears that in the Fall of 1939 he was employed in a CCC camp on Warm Springs Reservation, Oregon, that he went to Portland, Oregon, for a few days visit apparently intending to return to his work but did not, and no trace has been found of him although Umatilla Agency has made diligent search for him. He still has some wages due him for his CCC work and some cash has come into his account at Umatilla Agency since his disappearance on a lease; his folder shows that heretofore he was a wanderer but each year when lease money was due he was prompt in sending for it. The feeling at the Umatilla Agency is that he may be dead.

The said son is recommended to be found the heir in the case and should evidence be found at a later date that he died before his father it will be a simple matter to vacate the finding herein indicated as after the claims and probate fee are paid this estate wil be kept intact for whatever eventually should develop. If it be found that Joseph Thomas died before his father then Joe Hayes appears to be in line for inheritance; if Joseph Thomas survived the father it might be that his half-brother (maternal), Sam Luton, will be the heir. As Joseph Thomas has a reputation for travelling around it is entirely possible that he will show up at Umatilla Agency in due course.

The claim of George Moens, Pendleton, Oregon, in amount, $87.13, is recommended for payment in full. It appears he was co-signer with decedent on the three notes filed with the claim, all of which feel due after decedent's death and the claimant paid same with the interest charges thereon.

The claim of White House Market, $21.37, for merchandise sold decedent in period, April 1 to June 30,

1940, appears to be just and is recommended for allowance.

The claim of Miller's Service Station, Pendleton, Oregon, in amount, $4.73, for gasoline and oil furnished decedent in September, 1940, is recommended for allowance.

The claim of The Green Grocery, Inc., of Pendleton, Oregon, in amount, $289.27, for merchandise sold to decedent in period, June 1 1939 to September 10, 1940, is recommended for allowance.

Fred R. Young, of Pendleton, Oregon, filed a claim, $196.46, on a judgment had against decedent December 26, 1922 and renewed Feb. 19, 1932; it appears the judgment arose out of merchandise sold to decedent in March, 1922 in amount, $53.80. An Indian's trust property is judgment-proof hence the judgment is of no effect against this estate and does not serve to change the transaction from an open account on which the Statute of limitations expired in 1928. The claimant testified that decedent refused to pay this account. It is recommended that the claim be not allowed.

/s/ Wilburt Bokker
WILBURT BOKKER

Special Examiner of Inheritance.